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**IN THE
COURT OF APPEALS OF INDIANA**

ROMILDA SMITH,)	
Appellant,)	
)	
vs.)	No. 49A02-0702-CV-152
)	
DENISE STADELMAIER, D.O. and)	
ST. VINCENT HOSPITALS AND HEALTH)	
SERVICES,)	
Appellees.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cale J. Bradford, Judge
Cause No. 49D01-0609-MI-40025

September 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Romilda Smith (“Smith”) appeals the dismissal of her proposed medical malpractice complaint against Dr. Denise Stadelmaier (“Dr. Stadelmaier”), D.O., and St. Vincent Hospital (“St. Vincent”). We affirm.

Issue

Smith raises the issue of whether the trial court abused its discretion in dismissing her proposed medical malpractice complaint.

Facts and Procedural History

On February 3, 2004, Smith filed a Proposed Complaint with the Indiana Department of Insurance (“IDOI”) alleging medical negligence on the part of Dr. Stadelmaier in her performance of Smith’s total knee replacement. Specifically, Smith alleged that the surgery caused one of her legs to be shorter than the other, requiring a second surgery. On February 23, 2006, the chairman of the medical review panel (“Chairman”) notified the parties that the medical review panel (“Panel”) had been formed and established the schedule for the submission of evidence to the Panel. Smith’s evidentiary submission was due on March 23, 2006, Dr. Stadelmaier’s and St. Vincent’s submissions were due on April 23, 2006, and Smith’s optional reply was due on May 9, 2006. Pursuant to Indiana Code Section 34-18-10-13, the Panel’s opinion was due 180 days after the selection of the last member of the Panel. Here, the deadline was August 23, 2006.

On March 20, 2006, Smith requested a thirty-day extension from the original March 23 due date to file her submission. By the end of April, Smith had yet to file her evidence with the Panel. On July 26, 2006, Dr. Stadelmaier sent correspondence to the Chairman,

requesting the status of Smith's submission and noting that Stadelmaier would not agree to waive the 180-day deadline. That same day, the Chairman sent a letter to Smith informing her that the Panel was still awaiting the parties' submissions and that the 180-day deadline of August 23, 2006, would not be met due to this delay.

Smith responded to the Chairman by letter on August 8, 2006, requesting another extension of time to October 9, 2006. Dr. Stadelmaier objected to Smith's extension request via a letter to the Chairman and Smith, reiterating that she would not agree to waive the 180-day deadline. No ruling was made on the extension request. After receiving no response from Smith, Dr. Stadelmaier filed a Petition For Preliminary Determination of Law and Motion to Dismiss on September 20, 2006, in the Marion County Superior Court. St. Vincent joined in Dr. Stadelmaier's motion. The trial court subsequently set the hearing for November 16, 2006. Smith filed her response to the motions on November 15, one day before the hearing.

At the hearing, Dr. Stadelmaier and St. Vincent argued that Smith allowed the 180-day deadline to run and failed to submit evidence without good cause. Smith's attorney informed the trial court that the delay in her submission of evidence was due to her treating physician ("Treating Physician") being absent from her practice for eight weeks prior to the hearing. According to Smith's counsel, the Treating Physician was in Chicago tending to her husband who was in his last stages of cancer. As explained by Smith's attorney, Smith expected the Treating Physician to opine that Smith's legs had been the same length prior to the knee replacement surgery performed by Dr. Stadelmaier. Smith considered her Treating Physician to be the key witness for her case. Smith had met with her physician once and

received assurances that the expected documentation was being prepared. Smith's counsel had also been in contact with the office of the Treating Physician and received some documentation that lacked the necessary level of specificity and subsequently received assurances that more detailed documentation would be provided the next week.

Another intended witness noted by Smith was Dr. Rau, Smith's subsequent treating surgeon. Smith explained that she did not have any evidence or statement from Dr. Rau, because his opinion would be based on the Treating Physician's opinion and documentation. In response to the trial court's question of whether Smith's counsel had been in contact with either of the intended witnesses, Smith's counsel replied that he had not.

In granting the motion to dismiss, the trial court noted:

[T]here was ample time to secure testimony. But what's more important to me is that . . . it doesn't appear that, you know, that anybody even knows what [the Treating Physician] might have to offer that might be of benefit to your client. As well as Dr. Rau. There's no evidence before the Court that they even stand ready to issue any opinion to support [Smith's] position.

Trial Transcript at 17. Smith now appeals.

Discussion and Decision

I. Standard of Review

The trial court dismissed Smith's proposed complaint before the IDOI pursuant to Ind. Trial Rule 41(E)¹ and Indiana Code Section 34-18-10-14 of the Medical Malpractice Act.

¹ Trial Rule 41(E) provides: Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion

We review such a dismissal for an abuse of discretion. Beard v. Dominguez, 847 N.E.2d 1054, 1058 (Ind. Ct. App. 2006), trans. denied, cert. denied, 127 S. Ct. 1286 (2007). A trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before the court. Id. We will affirm the trial court's decision if any evidence supports it. Id.

II. Analysis

On appeal, Smith argues that the trial court abused its discretion in dismissing her proposed complaint because she established good cause for her failure to submit evidence to the Panel. We disagree.

Indiana Code Section 34-18-10-14, a section of the Medical Malpractice Act, provides:

A party, attorney, or panelist who fails to act as required by this chapter without good cause shown is subject to mandate or appropriate sanctions upon application to the court designated in the proposed complaint as having jurisdiction.

Although the 180-day time period for the Panel's decision is not a statute of limitation or the functional equivalent of one, it is, however, well settled that a trial court is vested with the discretion to impose appropriate sanctions, including dismissal of a proposed complaint, when a party, without good cause shown, fails to act in a timely manner. Rambo v. Begley, 796 N.E.2d 314, 320 (Ind. Ct. App. 2003). Once a trial court has held a hearing and has imposed the sanction of dismissal for delay, it is incumbent upon the plaintiff to demonstrate

determines to be necessary to assure such diligent prosecution.

why, as a matter of law, the trial court should have been required to rule differently. Jones v. Wasserman, 656 N.E.2d 1195, 1197 (Ind. Ct. App. 1995), trans. denied. Therefore, to survive the motion to dismiss, Smith was required to show good cause for failing to submit her evidence in accordance with the schedule set by the Chairman.

Smith asserts that she was delayed in filing her evidence because she was unable to obtain the necessary documentation from the Treating Physician because the Treating Physician had been caring for her husband, who was in the final stages of cancer. Essentially, she argues that she did not have ample time to collect evidence because her Treating Physician was unavailable. At the hearing, Smith's counsel stated that the Treating Physician had been unavailable for eight weeks prior to the hearing. When the trial court inquired what had prevented the gathering of the needed evidence before that time, Smith's counsel responded: "[W]e were requesting documentation discussing back and forth who would provide what." Tr. 11 Upon further questioning by the trial court, it was also revealed that Smith's counsel had never personally spoken with either the Treating Physician or Dr. Rau, the key witnesses to Smith's case. As to obtaining evidence from Dr. Rau, Smith's counsel indicated that he had yet to prepare anything for submission because Dr. Rau's opinion was dependent on the Treating Physician's statement. The trial court concluded that despite the Treating Physician's unavailable status for two months prior to the hearing, Smith had ample time to secure testimony. We agree.

Smith's proposed complaint was filed on February 3, 2004, and the Panel was formed two years later. Once the Panel was formed, Smith had notice of the schedule and the deadline for her submission of evidence. Smith did request a thirty-day extension of time

from the original due date, but thereafter failed to communicate with the Chairman as to any frustrations in gathering evidence for submission. When the Chairman inquired in July of 2006 as to when to expect Smith's submission, Smith requested another extension into October without explanation. Furthermore, Dr. Stadelmaier's correspondence to the Chairman and Smith objecting to the second extension and refusal to waive the 180-day requirement went unanswered by Smith. Smith's explanation at the hearing for her delay was that her key witness was unavailable for eight or more weeks before the hearing in November of 2006. However, this explanation still does not account for why Smith could not have obtained the needed evidence in the twenty-nine months between the time she filed her proposed complaint and the time at which the Treating Physician became unavailable. Smith has not demonstrated good cause for failing to timely submit her evidence to the Panel. Therefore, the trial court did not abuse its discretion in dismissing the proposed medical malpractice complaint.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.